

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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| COMMONWEALTH EDISON COMPANY |) | |
| |) | |
| |) | Docket No. 14-0312 |
| Annual formula rate update and revenue |) | |
| requirement reconciliation under |) | |
| Section 16-108.5 of the Public Utilities Act |) | |

STATEMENT OF POSITION
OF
THE PEOPLE OF THE STATE OF ILLINOIS

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September 22, 2014

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I. INTRODUCTION/STATEMENT OF THE CASE

A. ComEd Filing

On April 16, 2013, Commonwealth Edison Company (“ComEd” or “Company”) filed with the Illinois Commerce Commission (the “Commission” or “ICC”) ComEd’s annual formula rate update and revenue requirement reconciliation and requested the Commission to authorize and direct ComEd to make the compliance filings necessary to place into effect the resulting charges to be applicable to delivery services provided by ComEd beginning on the first day of ComEd’s January 2015 billing period, as authorized by Section 16-108.5(d) of the Public Utilities Act (the “Act”), 220 ILCS 5/16-108.5(d).

ComEd's filing, consistent with Section 16-108.5(d)(1), included:

- updated inputs to the performance-based formula rate for the applicable rate year (2014) that are based on final historical data reflected in the utility’s most recently filed annual FERC Form 1 (for 2012) plus projected plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the inputs are filed (2013).
- a reconciliation of the revenue requirement that was in effect for the prior rate year (2012) (as set by the cost inputs for the prior rate year) with the actual revenue requirement for the prior rate year (as reflected in the applicable FERC Form 1 (for 2012) that reports the actual costs for the prior rate year).

The filing, consistent with Section 16 108.5(d)(1), also included: (1) a corporate officer certification relating to reconciliation Schedule “Sch. FR A 1 REC” and (2) the new delivery services charges corresponding to the updated costs and reconciled revenue requirement.

Statutorily, this docket must conclude no later than 240 days after April 16, 2014, or by December 12, 2014. 220 ILCS 5/16-108.5(d)(3).

The following ComEd witnesses testified in this case: Melissa Y. Sherrod (ComEd Ex. 1.0), Christine M. Brinkman (ComEd Exs. 2.0, 12.0 REV, and 25.0), Sandeep S. Menon (ComEd Exs. 3.0, 13.0, and 26.0), John Hengtgen (ComEd Exs. 4.0, 14.0, and 27.0), Kevin H. Garrido (ComEd Ex. 5.0), Michael C. Moy (ComEd Ex. 6.0), Ronald E. Donovan (ComEd Exs. 7.0, 16.0, and 29.0), Russell E. Feingold (ComEd Exs. 8.0, 17.0, and 33.0), Michael F. Born (ComEd Ex. 9.0), John L. Leick (ComEd Ex. 10.0), Ross C. Hemphill (ComEd Exs. 11.0 and 24.0), Kathryn Houtsma (ComEd Exs. 15.0 and 28.0), Gary Prescott (ComEd Exs. 18.0 and 31.0), Kevin B. Brookins (ComEd Exs. 19.0 and 32.0), Gary J. Wathen (ComEd Ex. 20.0), Dean F. Apple (ComEd Ex. 21.0), Christ T. Siambekos (ComEd Ex. 22.0), and James I. Warren (ComEd Exs. 23.0 and 33.0).

Staff presented the following witnesses who testified in this case: Theresa Ebrey (ICC Staff Exs. 1.0 and 7.0), Richard W. Bridal II (ICC Staff Exs. 2.0, 6.0, and 8.0), Phil A. Hardas (ICC Staff Ex. 3.0), Philip Rukosuev (ICC Staff Exs. 4.0 and 9.0), and Greg Rockrohr (ICC Staff Ex. 5.0)

The People of the State of Illinois (“AG”) presented the testimony of Michael L. Brosch (AG Exs. 1.0C2 and 3.0C) and David J. Effron (AG Exs. 2.0 and 4.0); and the City of Chicago (“City”), the Citizens Utility Board (“CUB”), and the Illinois Industrial Energy Consumers (“IIEC”) (collectively, “CCI”) presented the testimony of Michael P. Gorman.

During the course of the proceeding, Staff and other parties proposed various adjustments and changes to the Company’s proposed revenue requirements. ComEd accepted some of these adjustments and changes and disputed others.

An evidentiary hearing was convened in this docket at the Commission’s Chicago Office before duly authorized Administrative Law Judges (“ALJs”) on August 27, 2014 and August 28, 2014. The parties filed and served Initial Briefs on September 10, 2014. Reply Briefs were filed and served on September 17, 2014.

B. Legal Standard

This docket involves ComEd’s annual formula rate update under the Energy Infrastructure Modernization Act (“EIMA”), 220 ILCS 5/16-108.5, enacted October 27, 2011 and amended effective May 22, 2013 by Public Act 98-0015. EIMA authorizes electric utilities to change their rates every year based on a regulatory framework that includes a return on equity determined by the statute, a ten year investment commitment, a jobs commitment, establishment of a low income customer assistance fund, performance metrics, and an annual retrospective reconciliation of the revenue requirement and actual costs.¹ 220 ILCS 5/16-108.5(b) & (c).

Section 16-108.5(d) provides that “[e]ach such filing shall conform to the following requirements and include the following information:

(1) The inputs to the performance-based formula rate for the applicable rate year shall be based on final historical data reflected in the utility's most recently filed annual FERC Form 1 plus projected plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the inputs are filed. The filing shall also include a reconciliation of the revenue requirement that was in effect for the prior rate year (as set by the cost inputs for the prior rate year) with the actual revenue requirement for the prior rate year (determined using a year-end rate base) that uses amounts reflected in the applicable FERC Form 1 that reports the actual costs for the prior rate year. Any over-collection or under-collection indicated by such reconciliation shall be reflected as a credit against, or recovered as an additional charge to, respectively, with interest calculated at a rate equal to the utility's weighted average cost of capital approved by the

¹ “Actual costs” are adjusted from recorded values to exclude costs recovered through rate riders, to exclude costs allocable to ComEd’s FERC jurisdiction and to exclude costs that should be disallowed for ratemaking purposes as not prudent and reasonable.

Commission for the prior rate year, the charges for the applicable rate year.

220 ILCS 5/16-108.5(d), (d)(1).

The statute also provides that each “filing shall include relevant and necessary data and documentation for the applicable rate year that is consistent with the Commission’s rules applicable to a filing for a general increase in rates or any rules adopted by the Commission to implement this Section.” 220 ILCS 5/16-108.5(d)(3). Importantly, the General Assembly did *not* change the Commission’s authority to investigate and review a utility’s costs to assure that they are prudent and reasonable, authorizing the Commission to:

...enter upon a hearing concerning the *prudence and reasonableness of the costs incurred by the utility* to be recovered during the applicable rate year that are reflected in the inputs to the performance-based rate derived from the utility’s FERC Form 1....*The Commission shall apply the same evidentiary standards, including, but not limited to, those concerning the prudence and reasonableness of the costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of this Act.*

220 ILCS 5/16-108.5(d)(3)(emphasis added).

A finding of imprudence and unreasonableness must be based on substantial evidence, meaning “more than a mere scintilla; however, it does not have to rise to the level of a preponderance of the evidence. It is evidence that a reasoning mind would accept as sufficient to support a particular conclusion.” *Commonwealth Edison Co. v. Illinois Commerce Commission*, 405 Ill.App.3d 389, 398 (2010) (internal quotations and citations omitted). Costs that are unnecessary to the provision of service, or that the utility has not justified in amount are not reasonable or prudent. *Id.* (employee costs related to the merger activities of the utility’s parent not necessary to utility service, and the position that the employees worked on the merger for “free” was not credible).

II. OVERALL REVENUE REQUIREMENT

This formula rate update (“FRU”) proceeding sets ComEd’s distribution rates applicable during 2015. Those rates are set in order to address the balance of ComEd’s fully reconciled actual costs for rate year 2013 as well as the initial projection of ComEd’s 2015 costs as provided for by EIMA. The 2015 Rate Year Net Revenue Requirement used to set those rates derives from three figures:

1. The 2013 Reconciliation Adjustment – the difference between the revenue requirement used to set ComEd’s rates in effect in 2013 and the 2013 Reconciliation Revenue Requirement determined based on ComEd’s actual 2013 costs as reported in its Federal Energy Regulatory Commission (“FERC”) Form 1 for 2013, plus interest at ComEd’s

weighted average cost of capital applicable to any over-collection or under-collection indicated by the reconciliation calculation;

2. The 2015 Initial Rate Year Revenue Requirement – a projection of 2015 costs based on ComEd’s actual 2013 operating expenses and rate base plus projected 2014 plant additions and the associated adjustments to accumulated depreciation (the associated change in the depreciation reserve), depreciation expense, and, per the Commission’s prior Orders, accumulated deferred income taxes (“ADIT”); and
3. The “ROE Collar” adjustment relating to 2013.

ComEd presented evidence supporting its proposed 2015 Rate Year Net Revenue Requirement and the components thereof through the testimony of their witnesses and the attachments, schedules, and other exhibits they sponsored. Staff and intervenors presented evidence on a limited number of contested issues as well. The Commission’s determinations on the subject of revenue requirement issues are reflected and set forth later in this Order.

A. 2015 Initial Rate Year Revenue Requirement

ComEd requested a 2015 initial rate year revenue requirement of \$2,361,589,000, as reflected in its rebuttal schedules. ComEd Ex. 13.01, Sch. FR A-1. Staff and other parties recommended adjustments that serve to lower ComEd’s requested revenue requirement.

B. 2013 Reconciliation Adjustment

ComEd calculated 2013 Reconciliation Adjustment, reflecting the difference between the revenue requirement used to set rates in effect in 2013 and the actual 2013 Reconciliation Revenue Requirement, and the time value of money, as \$257,521,000. ComEd Ex. 13.01, Sch. FR A-1, line 24. Staff recommends a 2013 Reconciliation Adjustment, with interest, of \$199,532,000. Staff Initial Brief at 5. Other parties recommended reductions to the reconciliation adjustment to reflect the application of statutory interest to the net-of-tax, actual under-collection of the 2013 revenue requirement as well as adjustment to ComEd’s incentive compensation expenses.

C. ROE Collar and Penalty

In 2013 ComEd failed to meet the “service reliability” target. ComEd Ex. 2.0 at 11; AG Cross Ex. 12. This metric requires ComEd to achieve, over a ten year period, a “[s]eventy-five percent improvement in total number of customers who exceed the service reliability targets” contained in the Commission’s Rule 411.140(b)(4)(A)-(C). 220 ILCS 5/5-108.5(f)(4). *See* Docket 11-0772, Order at 8 (April 4, 2011); ComEd Commonwealth Edison Company’s Multi-Year Performance Metrics Annual Report for the Performance Year Ending December 31, 2013 filed in Docket 11-0721 on April 16, 2014 at 13. These performance targets address the number and the duration of “controllable interruptions” experienced by individual customers at three

different voltage levels. 83 Ill. Admin. Code 411.140(b)(4)(A)-(C). The details of ComEd's performance are found in the report referenced above in Docket 11-0772.

Pursuant to Section 16-108.5(f-5)(4), as a result of missing this performance metric, ComEd's authorized return on equity (ROE) under Section 16-108.5(c)(3) is to be reduced by 5 basis points (.05 percentage points). The allowed ROE under the formula for 2013 is 9.25%, which is reduced to 9.20% as a result of this penalty. ComEd Ex. 2.0 at 11.

ComEd actually achieved an ROE of 9.53%. ComEd Ex. 13.01, Sch. FR A-1, line 25. Because Section 16-108.5(c)(5) allows ComEd to retain an ROE up to 50 basis points above the target ROE, or 9.70% in 2013, there is no adjustment to ComEd's ROE in this docket notwithstanding the service quality penalty.

D. 2015 Net Revenue Requirement

ComEd requests a total revenue requirement in 2015 of \$2,619,210,000, consisting of a prospective revenue requirement for 2015 of \$2,361.6 million plus ComEd's claimed \$257.6 million reconciliation adjustment. This is a \$269.5 million increase over the current revenue requirement of \$2,349 million. See ComEd Ex. 13.01, Sch. FR A-1, lines 23, 24, 37, 38. Staff and other parties have recommended changes to the ComEd request, and the Commission's conclusions regarding the 2015 Rate Year Net Revenue Requirement are set forth later in this Order.

III. SCOPE OF THIS PROCEEDING

- A. Changes to the Structure or Protocols of the Performance-Based Formula Rate**
- B. The Definition of Rate Year and the Reconciliation Cycle**
- C. Original Cost Finding**
- D. Issues Pending on Appeal**

The Appellate Court has issued decisions in two of the last three formula rate cases appealed by ComEd. In both of those appeals (of Dockets 11-0721 and 12-0321), ComEd challenged the Commission's decision to adjust ComEd's billing determinants to reflect the customer growth reflected in ComEd's plant additions. In its review of Docket 11-0721, the Court affirmed the Commission's adjustment of billing determinants as recommended by the People, and held that ComEd had "not met its burden of proving that the Commission had violated the Act when it required an adjustment of ComEd's rates to take into account expected growth in the number of customers it served." 2014 IL App. (1st) 122860, ¶ 57. The Court also affirmed the Commission's rejection of ComEd's argument that it should have also adjusted the number of kWh consumed per customers. *Id.* at ¶ 58. In its review of Docket No. 12-0321, the Court reaffirmed its decision on billing determinants, and held that its "opinion deciding the 2011 Rate Case settled the legal issues that the Commission can use projected new business plant additions in establishing ComEd's rate, and the Commission is not required to also account for usage without any proof of what the cause is for the change in usage." 2014 IL App (1st) 130302, ¶ 57.

While ComEd witness Christine Brinkman continued to contest the billing determinants adjustment recommended by AG witness Effron, the Appellate Court has made it clear that this adjustment is lawful under the statute and ComEd is collaterally estopped from challenging it further. 2014 IL App (1st) 130302, ¶ 53 (“These legal issues have already been determined by this court and relitigation is barred by collateral estoppel”).

A second issue on appeal is whether the Commission has the discretion under EIMA to calculate the reconciliation adjustment so that interest is applied to a net-of-tax balance. While the Commission rejected the People’s proposed adjustment in Docket Nos. 13-0553 and 13-0318, it stated that it would revisit the issue if “further arguments from the parties are presented or clarity from the legislature is provided on this topic.” Docket No. 13-0553, Final Order at 43 (Nov. 26, 2013). The Appellate Court has not ruled on the issue yet. *See* IL App. Case No. 1-14-0114 (consolidated appeals).

IV. RATE BASE

A. Overview

- 1. 2013 Reconciliation Rate Base**
- 2. 2015 Initial Rate Year Rate Base**

B. Potentially Uncontested Issues

C. Potentially Contested Issues

2.Other (including derivative adjustments)

The People of the State of Illinois recommend adjustments to rate base associated with their adjustments to the Annual Incentive Plan and Long Term Incentive and Other Compensation plans. The rate base adjustment is associated with the incentive compensation expense adjustments and will be discussed in section V.C.2. below.

The People also recommend, as an alternative adjustment to applying interest to the net-of-tax reconciliation under-collection discussed in section VII.B.1 below, that the ADIT associated with the delayed recovery and taxation of reconciliation revenues be deducted from rate base, in the same manner as other ADIT balances recognized within rate base applicable to the delivery services jurisdiction. This adjustment is discussed in section VII.B. below.

V. OPERATING EXPENSES

A. Overview

B. Potentially Uncontested Issues

C. Potentially Contested Issues

- 1. Depreciation for the Filing Year Revenue Requirement**
- 2. Incentive Compensation Program Expenses**
 - a. Annual Incentive Program (“AIP”)**

The structure of ComEd’s AIP and its associated Shareholder Protection Feature are largely undisputed. The record contains the formal plan document that governs all AIP programs

at Exelon Corp. operating companies, including ComEd (AG Exhibit 3.6 at 2-8); the informational guide to the ComEd AIP that is distributed to ComEd employees (ComEd Exhibit 2.01); and the informational guide to the Exelon AIP, including the Shareholder Protection Feature that applies to ComEd's AIP (AG Exhibit 1.7 at 2-12).

The AIP provides what ComEd calls "pay at risk" (ComEd Ex. 18.0 (Rev.) at 4:65-76) to all ComEd employees based on achievement of Key Performance Indicators ("KPIs") related to ComEd operational performance. AG Ex. 1.7 at 5; ComEd Ex. 2.01 at 3. The ComEd AIP in 2013 had eight operational metrics, two of which relate to ComEd cost controls and six of which relate to ComEd operations. ComEd Ex. 2.0 at 17:349. An aggregate index of the eight operational KPIs, ranging from 50% to 200%, is calculated and called the Company Performance Multiplier. AG Ex. 1.7 at 5, 11. In order to determine the actual AIP payout for an employee, Company Performance Multiplier is then multiplied against a percentage of the employee's incentive-eligible base salary referred to as the "target opportunity" that can range up to 30% depending on seniority and job type. AG Ex. 1.7 at 3; Tr. at 258:1-3, 271:3-7. Non-represented employees, who represent 38.3 percent of the ComEd employee base (AG Cross Exhibit 14 at 1), also have their AIP payout multiplied by an additional index, known as the Individual Performance Multiplier (AG Ex. 1.7 at 2), based on certain individual achievements, that ranges from 50% up to 120%. AG Ex. 1.7 at 2, 8; Tr. at 258:10-14, 272:4-5. Although the Company Performance Multiplier could be reduced to zero if KPI achievement is poor, it (and thus incentive pay) can never be negative; that is, AIP incentive pay can only increase and would never reduce base salary, as ComEd witness Wathen confirmed during cross-examination. Tr. at 111:20-112:2.

In summary, AIP pay before considering the Shareholder Protection Feature is calculated according to the following formula, described at AG Exhibit 1.7 at 3:

| | | | | | | |
|--|---|--|---|--------------------------------------|---|---|
| Employee's Incentive-Eligible Salary | X | Target Incentive Opportunity Percentage | X | Company Performance Multiplier | X | Individual Performance Multiplier (for only non- represented employees) |
|--|---|--|---|--------------------------------------|---|---|

The calculation of the Company Performance Multiplier and the additional Individual Performance Multiplier are subject to other terms of the plan. The Shareholder Protection Feature impacts the amount of AIP incentive payouts depending on the realized value of Exelon Corp. non-GAAP earnings per share ("EPS") and applies to all ComEd employees. ComEd Ex. 2.0 at 17:349. The Shareholder Protection Feature also applies to all AIP pay paid to Exelon Business Services Company employees, some of which has been included in ComEd's asserted revenue requirement in this proceeding. Tr. at 277:21-278:3.

In 2013, the Shareholder Protection Feature set a "threshold" level of Exelon Corporation's non-GAAP earnings per share of \$2.22, a "target" level of \$2.49, and a "distinguished" level of \$2.72. AG Ex. 1.7 at 4; AG Ex. 3.5 at 1. Exelon Corp. earnings per share achievement of \$2.22, \$2.49 or \$2.72 would impose a limitation upon the Company Performance Multiplier of 70 (50% plus 20 percentage points), 120% (100% plus 20 percentage

points) and 220% (200% plus 20 percentage points). EPS results between those points would impose proportional limitations. AG Ex. 1.7 at 4; AG Ex. 3.5 at 1. Under the terms of the Shareholder Protection Feature, the Company Performance Multiplier cannot exceed these Exelon Corp. earnings per share percentages, and Company Performance Multipliers that exceed this limit will be reduced down to the cap equal to the EPS percentage including the extra 20 percentage points. AG Ex. 1.7 at 7.

If Exelon Corp. earnings per share is below the threshold value of \$2.22, instead of the ordinary rule regarding 20 percentage points, AIP payout is reduced to zero no matter what the Company Performance Multiplier is (“[t]hreshold or higher EPS performance is required for any payout to occur under the AIP”). AG Ex. 1.7 at 7. If the Exelon EPS minimum is not met, the Shareholder Protection Feature reduces AIP payout to zero regardless of how well ComEd employees perform and how many KPIs are met, subject only to the CEO discretionary feature. AG Ex. 3.0C at 21:476-478. The AIP program imposes this risk that employee incentive compensation may be limited based on a metric that ComEd employees have little control over.

In 2013 the Company Performance Multiplier based on the operational KPIs was 140.39%. However, the Exelon Corp. earnings per share for 2013 was \$2.50, which fell slightly above the “target” earnings per share level of \$2.49 set in the Shareholder Protection Feature, resulting in a 104.35% plus 20% (124.35%) cap on the Company Performance Multiplier. As a result, the effective Company Performance Multiplier was reduced from 140.39% to 124.35% (20 percentage points above 104.35%). ComEd Ex. 2.0 at 23:472-475; AG Ex. 3.4 at 3; AG Ex. 3.5.

The Shareholder Protection Feature reduced ComEd’s 2013 AIP payout to employees by approximately \$8.5 million. ComEd Ex. 12.0 at 6:117-118. Not only does the Shareholder Protection Feature impact AIP payouts in a direct way, but it designed to be highly sensitive to the ultimate achieved value of Exelon EPS. The AG notes that Exelon EPS has a probabilistic character and could take many different *possible* values. ComEd witness Prescott confirmed in cross-examination that the threshold, target, and distinguished levels in the Shareholder Protection Feature are set by estimating the probability that Exelon EPS will achieve various levels. Tr. at 263:21-264:4. As Mr. Brosch noted in his rebuttal testimony, if Exelon Corp.’s actual earnings per share had been just four cents higher in 2013, at \$2.54 instead of \$2.50, the calculated EPS percentage for purposes of the Shareholder Protection Feature would have been 121.74% and thus the maximum allowed Company Performance Multiplier would have been 141.74% – meaning that the actual Company Performance Multiplier of 140.39% would not have been reduced or limited. AG Ex. 3.0C at 23:519-523.

i. AG Position

Section 16-108.5 of the Public Utilities Act Requires 100% Disallowance of ComEd’s Requested 2013 AIP Expense.

The controlling legal rule for recovery of incentive compensation by large electric utilities in Illinois is found in Section 16-108.5(c)(4)(A) of EIMA, 220 ILCS 5/16-

108.5(c)(4)(A), which provides that the Commission's formula rate for EIMA-electing electric utilities must

Permit and set forth protocols, subject to a determination of prudence and reasonableness consistent with Commission practice and law, for the following:

(A) recovery of incentive compensation expense that is based on the achievement of operational metrics, including metrics related to budget controls, outage duration and frequency, safety, customer service, efficiency and productivity, and environmental compliance. Incentive compensation expense that is based on net income or an affiliate's earnings per share shall not be recoverable under the performance-based formula rate.

The AG maintains that under Section 108.5(c)(4)(A), ComEd's 2013 AIP expense was based on an affiliate's earnings per share and thus is not recoverable.

1. The Jurisprudence of 'Based On' Supports Disallowance.

As discussed above, the factual contours of ComEd's 2013 AIP and its Shareholder Protection Feature are largely undisputed. The main *legal* question for resolution of this issue is how to interpret the statutory term "based on". If ComEd's 2013 actual AIP expense is "based on" the earnings per share of Exelon Corp., its corporate parent (and thus its affiliate), then the expense is not recoverable. While this question has not been previously litigated since the EIMA amendments to the Public Utilities Act were passed in 2011, the Seventh Circuit Court of Appeals recently considered the meaning of the term "based on" in a federal criminal sentencing law, 18 U.S.C. § 3582(c). The statutory provision applied expressly to "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" and authorized the federal district court to reduce the sentence in such situations. *Id.* In the case at bar, there was "no question that the Commission lowered the sentencing range for crack-cocaine offenses." *U.S. v. Ray*, 598 F.3d 407, 409 (7th Cir. 2010). Thus, the 7th Circuit needed only to decide whether the defendant had been sentenced "based on" the federal Sentencing Guidelines. *Id.* The defendant's plea agreement had "provided that the government would move the court 'to depart from the applicable sentencing guidelines range ... and to impose the specific sentence agreed to by the parties.'" *Id.* The Court noted that "it seems most unlikely that the agreed sentence was arrived upon by chance and without regard to the Guidelines, which presumably featured prominently in the parties' negotiations." *Id.* Despite this plausible connection between the agreed sentence and the Guidelines, the Court stated its holding clearly:

Does the plea agreement *clearly* reflect an intent to tie the sentence to the Guidelines so that, if the Guidelines are subsequently adjusted, the sentence should be similarly adjusted? If so, the sentence may be said to be "based on" the Guidelines. Here, however, there is no indication of such an intent.

Id. Thus, the 7th Circuit held that the defendant's sentence was not "based on" the Sentencing Guidelines.

The AG argues that in the instant matter, the Shareholder Protection Feature, based on Exelon EPS, establishes a potential range for AIP payout as a percentage of the target opportunity, as discussed above. (Where the actual payout falls within that range would be determined by the achievement of operational KPIs and thus the aggregate Company Performance Multiplier.) AG Exhibit 1.7, the Exelon AIP guide, clearly reflects an intent to shrink the range of potential payout to the extent that the performance percentage of Exelon Corp. EPS falls lower, or to increase the range of potential payout to the extent that realized Exelon Corp. EPS falls higher (as in the hypothetical New Year's Eve example explored during cross-examination with Ms. Brinkman, Tr. at 169:2-173:10). If the top of the SPF-determined range falls below the realized value of the Company Performance Multiplier and thus becomes a binding constraint, then, under the express terms of the Shareholder Protection Feature, any upward or downward movement of Exelon EPS (compared to what was expected, or compared to what was preliminarily calculated) necessitates a like adjustment of actual AIP payout. Thus, the AG avers that under the 7th Circuit's logic, AIP expense is clearly "based on" Exelon EPS.

The AG presents an alternate approach to interpreting the term "based on," drawing on a slightly older Illinois appellate case, in which a high school student had injured herself on school grounds and sued the school district. The district moved to dismiss based on a statute that provides immunity to local public entities "where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes." 745 ILCS 10/3-106. Interpreting this statutory language, the Fifth District held that "[t]he plain and ordinary meaning of the phrase 'liability is based on' is that the entity's duty must be *derived from* its control of the property" (emphasis added). *Manuel v. Red Hill Community Unit School Dist. No. 10 Bd. Of Educ.*, 324 Ill.App.3d 279, 284 (5th Dist. 2001).

In the instant proceeding, the AG points out that the amount of ComEd's actual AIP expense is clearly based on or "derived from" the level of Exelon Corp. non-GAAP earnings per share for 2013. Because Exelon EPS at approximately 104% of target was a binding constraint to the calculated Company Performance Multiplier of approximately 140%, had Exelon Corp.'s EPS been one cent higher or one cent lower than \$2.49, ComEd's actual AIP payout would have been slightly higher or lower than it actually was. The evidence shows that Exelon Corp. earnings per share was integral to determining the amount of actual AIP payout or expense. Hence, it is entirely reasonable and appropriate for the Commission to conclude that AIP expense was "derived from" Exelon EPS.

2. Commission Precedent Supports Disallowance.

The AG identified several prior Commission orders, discussed by Staff witness Bridal (Staff Ex. 8.0 at 22:508-26:619), that support the disallowance of ComEd's 2013 AIP expense in this proceeding because it is based on Exelon Corp.'s earnings per share.

In Docket Nos. 06-0070/0071/0072 (cons.), the Commission denied 100% of the Ameren utilities' test-year incentive compensation expense, which had the following restriction, as stated in Ameren's own filing: "If the organization does not meet pre-defined EPS goals (as stated in

the Plans), incentive awards are not available.”² The Commission found that, under the Ameren incentive plans, “all operational goals are dependent upon meeting the EPS target first” and thus it decided to “disallow[] funding measures that primarily depend on meeting financial goals.”³ Similarly, in ComEd’s 2013 AIP, the payout of *any* incentive pay depends on Exelon’s meeting the pre-set threshold non-GAAP EPS level (set at \$2.22 in 2013).

The AG asserted that parent company financial targets have consistently led to Commission disallowance of incentive pay. For example, in Docket No. 07-0507, the Commission denied recovery of 100% of Illinois-American Water Company’s test-year incentive compensation expense because it was dependent on the parent company’s reaching certain financial performance targets.⁴ In Docket No. 07-0585, the Commission allowed recovery of only 50% of the Ameren Illinois Utilities’ test-year incentive compensation expense, because the *other* 50% of incentive compensation was dependent on the parent company’s meeting financial targets.⁵

In Docket No. 05-0597, the Commission found that 50% of ComEd’s test-year incentive compensation expense was based on Exelon EPS⁶ and thus disallowed recovery of that amount.⁷ While Ms. Brinkman asserted in a discovery response in this proceeding that “an Exelon EPS limiter with a minimum threshold EPS performance applied to the entire AIP award,” AG Cross Exhibit 13 at 2, ComEd’s testimony in Docket No. 05-0597 specified that the EPS-based Shareholder Protection Feature for the test year in that rate case applied only “to performance on operational metrics which exceed the target level” of operational goals, and also that ComEd was not seeking inclusion in rates of any of the above-target operational-based AIP pay.⁸ The AG suggests that this is a crucial difference from the operation of the Shareholder Protection Feature in ComEd’s 2013 AIP, which could potentially reduce AIP pay to 0% of target opportunity even when the Company Performance Multiplier achievement were below target, such as 50%.

In Docket No. 05-0597, ComEd submitted for rate recovery *only* those AIP expenses which, by the terms of the AIP (as reported by ComEd in testimony), could never be based on

² Order, Docket Nos. 06-0070/0071/0072 (cons.), November 21, 2006, at 69 (available at <http://www.icc.illinois.gov/downloads/public/edocket/186116.pdf>).

³ *Id.* at 72.

⁴ Order, Docket No. 07-0507, July 30, 2008, at 26-27 (available at <http://www.icc.illinois.gov/downloads/public/edocket/227276.pdf>).

⁵ Order, Docket No. 07-0585, September 24, 2008, at 107-108 (available at <http://www.icc.illinois.gov/downloads/public/edocket/230646.pdf>).

⁶ Order, Docket No. 05-0597, July 26, 2006, at 91 (available at <http://www.icc.illinois.gov/downloads/public/edocket/178278.pdf>).

⁷ *Id.* at 96. *See also* ComEd Ex. 18.0 (Rev.) at 9:184-10:186 (admission by Mr. Prescott that, in Docket No. 05-0597, “the Commission disallowed recovery of 50% of ComEd’s AIP – the portion that was based on EPS”).

⁸ Docket No. 05-0597, ComEd Ex. 13.0 at 18:410-415 (available at <http://www.icc.illinois.gov/downloads/public/edocket/162087.pdf>); *see also* Docket No. 05-0597, ComEd Ex. 19.0 at 49:1079-1082 (available at <http://www.icc.illinois.gov/downloads/public/edocket/162106.pdf>).

Exelon Corp. earnings per share. Additionally, the Initial Briefs⁹ and the Reply Briefs¹⁰ filed by the People and the ICC Staff in that proceeding do not appear to mention ComEd's Shareholder Protection Feature that applied to the operational-based AIP payouts for that test year, and the Order in that docket does not appear to mention the Shareholder Protection Feature, either.¹¹ The AG maintains that even if the structure of the Shareholder Protection Feature connected to ComEd's AIP in that proceeding were comparable to the Shareholder Protection Feature at issue this year (which it is not), it is difficult to draw any inferences about the Commission's policy on the matter when it did not even discuss the feature.

The AG also emphasized that the Appellate Court upheld the Commission's disallowance of the 50% of test-year AIP expense in Docket No. 05-0597 that was based on Exelon EPS in *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 398 Ill.App.3d 510 (2nd Dist. 2009). Here, the Court held that "the Commission could have reasonably concluded that the earnings-per-share portion of the plan provided only a tangential benefit to ratepayers", 398 Ill.App.3d 510, 552. The Court also held that "the notion that an earnings-per-share-based employee incentive plan provides benefits to shareholders is hardly a controversial proposition", *id.* at 553.

In Docket No. 07-0566, the Commission disallowed "100% of AIP costs related to the financial net income goal which primarily benefits shareholders."¹² While Ms. Brinkman asserted in a discovery response in this case that ComEd's 2006 AIP plan at issue in Docket No. 07-0566 "contain[ed] an Exelon EPS limiter" and that ComEd provided the plan information to the parties during discovery (AG Cross Exhibit 13 at 5), during cross-examination she was unable to say whether that information was entered into the record in Docket No. 07-0566. Tr. at 183:16-184:1. The AG's review of the Initial Briefs dated May 29, 2008 filed by ComEd¹³, the People¹⁴, Staff¹⁵, IIEC¹⁶, and CUB¹⁷ in that proceeding shows that, while the parties debated the

⁹ See Docket No. 05-0597, Initial Brief of the People of the State of Illinois, April 25, 2006, available at <http://www.icc.illinois.gov/downloads/public/edocket/170610.pdf>; Docket No. 05-0597, Reply Brief of the Staff of the Illinois Commerce Commission, April 25, 2006, available at <http://www.icc.illinois.gov/downloads/public/edocket/170626.pdf>.

¹⁰ See Docket No. 05-0597, Reply Brief of the People of the State of Illinois, May 11, 2006, available at <http://www.icc.illinois.gov/downloads/public/edocket/172316.pdf>; Docket No. 05-0597, Reply Brief of the Staff of the Illinois Commerce Commission, May 11, 2006, available at <http://www.icc.illinois.gov/downloads/public/edocket/172335.pdf>.

¹¹ See Order, Docket No. 05-0597, July 26, 2006, at 90-97.

¹² Order, Docket No. 07-0566, September 10, 2008, at 61 (available at <http://www.icc.illinois.gov/downloads/public/edocket/229809.pdf>). See also ComEd Ex. 18.0 (Rev.) at 10:189-191 (admission by Mr. Prescott that in Docket No. 07-0566, "the Commission disallowed recovery of the portion of ComEd's AIP that was based on the net income goal").

¹³ <http://www.icc.illinois.gov/downloads/public/edocket/223353.pdf>.

¹⁴ <http://www.icc.illinois.gov/downloads/public/edocket/223357.pdf>.

¹⁵ <http://www.icc.illinois.gov/downloads/public/edocket/223352.pdf>.

¹⁶ <http://www.icc.illinois.gov/downloads/public/edocket/223385.pdf>.

¹⁷ <http://www.icc.illinois.gov/downloads/public/edocket/223366.pdf>.

incentive compensation issue spiritedly, no party mentioned any Exelon EPS limiter, and the Commission's Order¹⁸ similarly did not mention it.

ComEd's first rate case following passage of EIMA in October 2011 was Docket No. 11-0721, which set a revenue requirement for 2012 based on 2010 expenses. Under ComEd's 2010 AIP program, a ComEd net income limiter was in place – but it applied to limit 2010 pay “only if the composite payout exceed[ed] target level,” according to a discovery response by ComEd entered into that proceeding's record by the ICC Staff.¹⁹ Thus, notes the AG, it did not have the potential to reduce actual AIP payout all the way to zero, as the Shareholder Protection Feature in 2013's AIP did. Moreover, while the net income limiter was calculated to be 102.9% for 2010 and the KPI index²⁰ was 110.3% for that year, seemingly creating a binding constraint of 102.9% on AIP payout, ComEd leadership decided under the CEO Discretionary Feature to increase the net income limiter to 112.9%, according to a separate discovery response from ComEd entered into the record.²¹ As Staff suggested in briefing, as summarized by the Commission, “[t]he net income limiter feature is deceiving . . . because management can at its discretion increase that limit with board approval.”²² In other words, the AG argues that ComEd incentive pay for 2010 was *not* based in any way on net income, because as actual experience revealed, the CEO Discretionary Feature rendered the net income limiter non-operational; the purported constraint had no bite. No party argued that the net income limiter *per se* warranted disallowance of recovery of all 2010 AIP pay, and, regardless of what parties may have said, the Commission had no reason to disallow ComEd AIP expense for 2010 based on a § 16-108.5(c)(4)(A) argument.²³ The AG argues that while ComEd witness Brinkman suggested in her surrebuttal testimony in this proceeding that “[a]pplying the logic behind the Commission's decision in Docket No. 11-0721 to this case would result in allowing recovery of exactly what ComEd has requested – 124.4% – the amount of AIP paid out after applying the limiter” (ComEd Ex. 25.0 at 4:67-69), the Shareholder Protection Feature in ComEd's 2013 AIP is nothing like the net income limiter in ComEd's 2010 AIP.

Subsequently, notes the AG, the Commission in both of Docket Nos. 12-0321 and 13-0318 did not discuss in its respective Orders any ComEd net income limiter or Exelon EPS limiter applicable to the 2011 or 2012 ComEd AIPs, respectively, and no party mentioned any such limiter in briefs. ComEd confirmed in a discovery response that incentive compensation was an uncontested issue in Docket No. 12-0321 (AG Cross Exhibit 13 at 5; *see also* Staff Ex. 8.0 at

¹⁸ Order, Docket No. 07-0566, September 10, 2008, at 54-61.

¹⁹ Docket No. 11-0721, Staff Ex. 13.0, February 24, 2012, Attachment A, available at <http://www.icc.illinois.gov/downloads/public/edocket/313571.pdf>, 27th page of PDF.

²⁰ This index was akin to the Company Performance Multiplier in the 2013 ComEd AIP.

²¹ *Id.* at Attachment B (same URL, 28th page of PDF).

²² Order, Docket No. 11-0721, May 29, 2012, at 89 (available at <http://www.icc.illinois.gov/downloads/public/edocket/322042.pdf>).

²³ The Commission *did* disallow some of ComEd's 2010 AIP pay for a different reason: “a cap on incentive compensation benefits that are recoverable through rates is necessary, given the potential for manipulation between the two incentive compensation programs” [the second program being the Long-Term Incentive Plan], *id.* at 90. The Appellate Court, First District later upheld this decision in *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 2014 IL App (1st) 122860 (March 26, 2014), at ¶¶ 62-65.

27:664), and ComEd witness Prescott was unable to say during cross-examination whether it was a contested issue in Docket No. 13-0318 (Tr. at 267:4-16, 295:20-296:13). In fact, it is clear from the Docket No. 13-0318 order that the Shareholder Protection Feature in the ComEd AIP was also an uncontested issue there.²⁴ Although the several rate cases from 2005 through 2007 discussed above are very instructive, the AG concludes that no lesson can be drawn from any of ComEd's previous three formula rate cases as to whether ComEd's 2013 AIP expense based on the Shareholder Protection Feature should be recoverable or not, and that current law requires that the AIP expenses be removed from ComEd's revenue requirements under 108.5(c)(4)(A), because it was based on an affiliate's earnings per share and thus is not recoverable under the law.

3. The Shareholder Protection Feature Does Not Promote Better Customer Service

The AG supports disallowing the AIP because of its effect on customer service and employee motivation as well as strictly on a legal basis. The AG notes that several ComEd witnesses insisted in their testimony that the alignment of AIP pay with operational KPIs is intended to incent ComEd employees to work toward the Company's realization of operational goals, but the totality of the evidence suggests otherwise. See, e.g., ComEd Ex. 2.0 at 19:403-20:408 (Ms. Brinkman); ComEd Ex. 18.0 (Rev.) at 5:96-100 (Mr. Prescott); ComEd Ex. 19.0 at 14:265-268 (Mr. Brookins). As Mr. Brookins admitted during cross-examination, ComEd communicates the Shareholder Protection Feature to its employees each year in a way "designed to inform our employees that the amount of AIP earned could be limited by the Shareholder Protection Feature." Tr. at 320:1-19. ComEd witness Mr. Apple, President of IBEW Local 15, also admitted that IBEW members that are employed by ComEd receive information describing how their AIP incentive pay may be limited by Exelon Corp.'s earnings per share. AG Cross Exhibit 19 at 40. Mr. Prescott admitted that he does not believe that ComEd employees are unaware of press reports and financial forecasts regarding Exelon Corp. AG Ex. 3.7 at 3. Relatedly, Mr. Brookins admitted during cross-examination that Exelon Corp.'s EPS is publicly reported in financial media (Tr. at 330:20-22), from which it can be inferred that ComEd employees could go to Google.com and check "Exelon earnings per share" whenever they wanted. The AG pointed out that ComEd witness Mr. Brookins admitted that ComEd employees were "very proud" of their operational and cost control achievements in 2013 and were "disappointed" when their incentive compensation was limited by the Shareholder Protection Feature. AG Cross Exhibit 14 at 2. The AG suggested that one can only guess how that disappointment might impact employee motivation to work toward operational goals in future years.

The AG pointed out that the premise of incentive compensation is that employees will respond to financial incentives in ways that produce tangible operational benefits and/or cost savings that exceed the costs of the additional compensation. Under this premise, insertion of a

²⁴ See Order, Docket No. 13-0318, December 18, 2013, at 38 ("The incentive compensation program expenses at issue in this docket are: (1) ComEd's Long-Term Performance Share Awards Program ("LTPSAP"), and (2) incentive compensation associated with ComEd's energy efficiency employees"), available at <http://www.icc.illinois.gov/downloads/public/edocket/365294.pdf>.

Shareholder Protection Feature based upon Exelon EPS serves to dilute or completely eliminate the intended linkage between operational performance and the incentive payouts actually received by the employees. AG Ex. 3.0C at 25:566-571. Moreover, “[i]f an EPS Shareholder Protection Feature has the effect of constraining the compensation paid to employees for exceptional operational performance, the employees’ focus can be expected to shift toward efforts that improve Exelon EPS, rather than focusing solely upon operational performance.” Id. at 25:571-26:575. Mr. Brosch stated flatly that “[i]f my compensation were driven by the EPS of my employer or its affiliate, I would monitor and seek to improve EPS performance in every way possible.” Id. at 27:604-606.

If considerations of individual salary and future opportunities are sufficient to properly motivate employees to work toward the operational KPIs (see, e.g., Mr. Brookins’s discussion of the importance of the Individual Performance Multiplier and other individual employee recognition in his surrebuttal testimony, ComEd Ex. 32.0 at 3:55-64), it is difficult to understand why AIP pay is necessary to motivate such achievement. On the other hand, if AIP pay is, in part, necessary to properly motivate employees to achieve the operational KPIs, as ComEd has suggested, the AG asserts that it is difficult to believe that the (hypothetical) recognition of a risk that AIP pay could be reduced to zero would not reduce employee motivation by any degree whatsoever. If employees are very motivated by personal financial gain toward increasing their AIP pay (as ComEd witness Brookins admitted, Tr. at 319:6-18), it seems obvious how that motivation would be affected by an apparent risk of losing all AIP pay and it would be in the personal interest of ComEd employees to maximize the probability that Exelon’s EPS will be high enough so it does not limit AIP payout. ComEd witness Mr. Apple also admitted that “not every aspect of the AIP framework will be beneficial to IBEW members and that [the Shareholder Protection Feature] may operate to reduce the payout of incentive compensation when considered in isolation.” AG Cross Exhibit 19 at 2.

The AG discussed, as an example, that three ComEd employees and one Exelon Business Services Company employee (whose AIP pay is part of ComEd’s asserted revenue requirement) have submitted testimony in support of the inclusion of approximately \$39 million of AIP expense in the Company’s 2013 reconciliation revenue requirement. It is very possible that, should ComEd be denied recovery of the \$39 million of 2013 AIP expense in its 2013 reconciliation revenue requirement, the loss of that \$39 million in authorized 2015 revenue will be \$39 million that the Exelon family of companies will never get back, thus reducing 2015 Exelon EPS by over 2 cents per share, according to Mr. Brookins’s math. Because ComEd employees have a personal financial interest in seeing that the Shareholder Protection Feature not be triggered in 2015, they have a strong interest in defending the inclusion of incentive compensation issue in ComEd’s revenue requirement – just to pick one example from many possible examples of mechanisms to increase Exelon’s EPS that work against consumer interests. Other mechanisms mentioned by the AG by which ComEd employees could work to increase Exelon’s EPS include trying to defeat other expense disallowance proposals in annual formula rate update cases; expanding sales and thus actual revenues (which are never reconciled except through the ROE collar); and discouraging energy efficiency programs under Section 8-103 of the Public Utilities Act.

ComEd witness Mr. Prescott stated in a discovery response that the Shareholder Protection Feature “is intended to provide an indicator to the Exelon family of companies as to whether funds are available for incentive compensation pay in a given year.” AG Ex. 3.7 at 2. Mr. Prescott also stated that the “purpose” of the Shareholder Protection Feature is to not “reward the wrong behaviors” or “create unintended consequences with your rewards.” Tr. at 259:2-6. While he did not explain what the “wrong behaviors” might be, the best inference is that employees’ contributing to successful achievement of operational KPIs while Exelon Corp. had an unexpectedly bad financial year would be the “wrong behaviors” in this framing. However, the AG pointed out that if ComEd expects all AIP expense to be recoverable from ComEd ratepayers through its annual formula rate updates under EIMA, it is not clear why Exelon Corp. shareholders need “protection” from paying out AIP incentive pay to ComEd employees even if Exelon as a whole has a bad year.

The AG further pointed out that programs like the Shareholder Protection Feature are not common among similar utilities. While ComEd witness Mr. Wathen, an outside compensation consultant, stated in his testimony that “limiters or modifiers” such as the Shareholder Protection Feature in ComEd’s AIP “are found in investor-owned utility short-term incentive plans,” ComEd Ex. 20.0 at 9:167-168, under cross-examination, he admitted that only one out of the nineteen peer utilities in his study had a modifier based on financial metrics. Tr. at 119:8-12; see also AG Cross Exhibit 11 at 2.

The AG also commented on ComEd’s efforts to imply that disallowance of 2013’s AIP expense, due to the Shareholder Protection Feature, would permanently end incentive compensation for ComEd employees. The People do not disagree with ComEd’s repeated contentions that incentive pay based solely on operational goals is a good idea. However, the Commission should also consider that Section 16-108.5 requires that rates, including the reconciliation adjustment, be based on actual historical costs, and *2013’s ComEd AIP expense is in the past*. It has been calculated and paid pursuant to the terms in effect in 2013 and described in AG Exhibits 1.7 and 3.6 and ComEd Ex. 2.01. Any future removal of the Shareholder Protection Feature from ComEd’s AIP, effective in 2014, 2015, or beyond, would not convert the 2013 AIP into a lawful program.

While several ComEd witnesses, including Mr. Prescott (ComEd Ex. 18.0 (Rev.) at 9:170-174) and Ms. Brinkman (ComEd Ex. 12.0 (Rev.) at 7:131-139) sought to characterize the Shareholder Protection Feature as a “customer protection feature” or one that provides benefits for customers by reducing Company expenses, it is not clear that the triggering mechanism of the Shareholder Protection Feature – Exelon Corp. earnings per share being lower than certain pre-set target levels – relates to any real need to protect customers from higher rates. As AG witness Brosch stated in his rebuttal testimony, “[i]f AIP awards payable for achievement of operational performance are excessive, this would be true without regard to Exelon’s achieved EPS.” AG Ex. 3.0C at 27:609-611. Additionally, it is unclear how or why a “customer protection” character of the Shareholder Protection Feature, if any, would save an otherwise unlawful incentive compensation program that is based on a corporate affiliate’s earnings per share.

4. The Chamber of Commerce Testimonies Should Not Be Considered

The AG also recommended that the Chamber of Commerce testimonies be given no weight. Just a few days before intervenor rebuttal testimony in this case was due in August, ComEd asked representatives of the Illinois Chamber of Commerce (“Illinois Chamber”) and Chicagoland Chamber of Commerce (“Chicagoland Chamber”) to intervene in this proceeding and file testimony supporting the ComEd AIP. Tr. at 62:22:63:19, 367:6-17. Both representatives filed testimony supporting incentive pay and warning that the People’s proposal could lead to the end of ComEd’s AIP program. Prior to their conversations with ComEd on or around August 10th, neither of the two Chamber representatives were aware of the People’s proposal regarding incentive compensation. Id. Although several of the member companies of the Illinois Industrial Energy Consumers in this proceeding are also members of one or both of the two Chambers of Commerce, neither Chamber asked those companies for input before deciding to intervene and file testimony, with the exception of one company that was already represented on the Illinois Chamber’s Government Affairs Committee. Tr. at 65:12-67:5, 368:14-370-14; AG Cross Exhibit 16. Despite suggesting that they were testifying in support of incentive pay linked to operational goals (IL Chamber Ex. 1.0 at 3:58-65; CCC Ex. 1.0 at 5:96-103), both Chamber representatives later denied believing that actual ComEd AIP payout is unaffected by Exelon EPS. AG Cross Exhibit 1 at 1; AG Cross Exhibit 15 at 3.

The AG provided the Commission with information about the relationship between the Chambers and Exelon that show that Exelon is an active and valued member of the Chambers. For example, ComEd and Exelon Corp. gave around \$140,000 to the Chicagoland Chamber in each of 2012 and 2013. Tr. at 371:15-21; AG Cross Exhibit 17. The AG also demonstrated that the Chamber representatives did not have a clear understanding of the AIP or of ComEd’s alternatives, let alone the law. Mr. Maisch suggested in testimony that Mr. Brosch is “seeking to erase” the Shareholder Protection Feature from the ComEd AIP (IL Chamber Ex. 1.0 at 6:126), and also that Mr. Brosch’s proposal would have the effect of “dismantling incentive compensation in its entirety” (id. at 7:128-129; see also AG Cross Exhibit 7 at 4). However, both the Illinois Chamber and the Chicagoland Chamber witnesses admitted that they had no contention as to how ComEd would actually respond if the Commission hypothetically disallowed AIP expense recovery, and that ComEd could “do any of a number of things”, with “many options to consider.” AG Cross Exhibit 7 at 2; Tr. at 77:20-78:11; AG Cross Exhibit 15 at 2; Tr. at 376:5-8. The Illinois Chamber witness admitted that “I don’t know what ComEd would do” under the hypothetical Commission disallowance (Tr. at 79:22) and that he was not even aware of whether ComEd can remove the Shareholder Protection Feature (AG Cross Exhibit 7 at 3; Tr. at 80:16-81:1). The Chicagoland Chamber’s witness Mr. Carpenter testified that while he knows that the Shareholder Protection Feature “could cause the ComEd AIP [payout] to be lesser than it would be otherwise” he admitted that he has no working knowledge of the provision or any understanding of what would cause the “limiter” to be invoked. Tr. at 377:13-22.

The AG concludes that there are many good reasons why the Commission should not give weight to the testimony filed by the two Chamber representatives.

5. The Alternative Proposals Offered By Staff and ComEd Have No Sound Basis.

Both Staff and ComEd have offered alternative proposals to the People's proposed 100% disallowance of ComEd AIP expense. Staff witness Mr. Bridal suggests in his rebuttal testimony that the Commission use the same 102.9% allowance percentage as it used to decide the contested incentive compensation issue in Docket No. 11-0721. ICC Staff Ex. 8.0 at 33:781-784. However, as discussed above, the 102.9% in Docket No. 11-0721 related to the percentage that ComEd would have paid before its Compensation Committee intervened and upended the terms of the 2010 AIP to increase that year's AIP pay. The lawfulness of ComEd's net income limiter was not at issue in Docket No. 11-0721, and the Commission's decision in that proceeding, as discussed above, was not an endorsement of the legality of the net income limiter. Because the issues related to AIP incentive pay differ significantly between Docket No. 11-0721 and the instant proceeding, there is no prudential or legal basis to import the Commission's approved AIP expense recovery cap from that proceeding into this one. The AG observes that ComEd witness Brinkman admitted that the 102.9% figure was based on facts specific to the 2010 AIP plan and does not specifically relate to the 2013 AIP plan. ComEd Ex. 25.0 at 3:62, 60.

Ms. Brinkman of ComEd proposed a different alternative in her surrebuttal testimony: "If the Commission chooses to impose an alternative limiter in this case, it should consider the facts of this case. Looking at ComEd's historical performance of the operational metrics and total payout since the adoption of EIMA, ComEd has performed on and paid AIP at the following levels:

| Earned AIP Based on Operational Metrics | | Actual Payout |
|---|--------|---------------|
| 2011 | 133.2% | 133.2% |
| 2012 | 148.4% | 115.0% |
| 2013 | 140.4% | 124.4% |
| Three Year Average | 140.7% | 124.2% |

Viewing this trend, ComEd suggested that the Commission could consider imposing a limit of 124.2% on the 2013 ComEd AIP plan. This alternative uses a three year average that considers the facts specific to the 2013 plan as well as ComEd's operational performance and total payout trend since the adoption of EIMA." ComEd Ex. 25.0 at 6:105-112. In cross-examination, however, Ms. Brinkman admitted that her only reason for using a three-year average was that three years of expenses have been reconciled by the Commission since EIMA was adopted in 2011. Tr. at 158:20-159:2. Moreover, Ms. Brinkman was unable to say during cross-examination whether any other elements of ComEd's asserted revenue requirement in this case are based on a three-year average of expenses. It is also not clear what "facts of this case" justify ignoring the plain unlawfulness of the Shareholder Protection Feature, deviating from the single year costs rule that governs formula rate cases and instead using a three-year average. Ms. Brinkman's alternative proposal lacks any legal or prudential basis and should be ignored.

In summary, the AG maintains that the prevailing legal precedents, taken with the factual contours of the 2013 ComEd AIP and its Shareholder Protection Feature, require 100% disallowance of 2013 ComEd AIP expense.

6. AG Conclusion on Incentive Compensation

The AG asserts that the Commission should find that 100% of ComEd's 2013 AIP expense was based on the earnings per share of Exelon Corp. and thus is not recoverable in rates. The Commission should disallow all of the Exelon Business Services Company AIP expense that has been included in ComEd's asserted revenue requirement, for the same reason. The AG further maintains that the Commission should disallow the portion of ComEd's LTPSAP expense that it seeks to include in revenue requirement. The numerical impact upon revenue requirement of the People's proposed adjustments are found at AG Exhibit 3.1, page 2 (\$39,145,065 for the AIP adjustment) and page 3 (\$187,437 for the LTPSAP adjustment).

b. Key Manager Long Term Performance Plan ("LTPP")

c. Disallowance of LTPSAP Expense

i. AG Position

Following the recommendation of AG witness Mr. Brosch, the AG also recommended the disallowance of 100% of ComEd's 2013 Executive Long Term Performance Share Award Program ("LTPSAP") expense. The AG cited the Commission's statement in last year's formula rate update proceeding in disallowing all of ComEd's 2012 LTPSAP expense:

The Commission agrees with CCI, Staff, and the AG that ComEd has failed to meet its burden in demonstrating that any portion of its Long-Term Performance Share Awards Program ("LTPSAP") satisfies the requirements under Illinois law for inclusion in rates. The EIMA is explicit that incentive compensation based on net income or an affiliate's earnings per share shall not be recoverable under a performance-based rate. 220 ILCS 5/16-108.5(c)(4)(A). The LTPSAP is based on the operational and financial performance of all subsidiaries of Exelon, ComEd's parent company. These award grants depend on a management committee's subjective assessment of the performance of all Exelon subsidiaries. There are no direct payout percentages assigned to any of the goals; thus, it cannot be determined what portion of an award is related to ComEd's operational performance and what weights were given to metrics related to EPS and the operations of other Exelon subsidiaries. ComEd retains the burden of proof, even in the new formula rate structure, to establish the justness and reasonableness of its proposed rates or other charges. *See* 220 ILCS 5/16-108.5(c); 220 ILCS 5/9-201(c). Staff's attempt to devise an approximation of the portion of LTPSAP attributable to Exelon's growth and performance (a position abandoned by Staff in its briefs) does not suffice when ComEd has not met its burden to demonstrate what portion of these executive incentive compensation awards are sufficiently related to ComEd's operational performance to justify inclusion in rates. The EIMA

thus prohibits recovery of any arbitrary portion of the LTPSAP and it is disallowed from recovery in its entirety.²⁵

AG witness Brosch observed in his direct testimony that the “metric weighting” values in the LTPSAP are not discretely calculated and applied based solely upon ComEd performance. Instead, as ComEd admitted in a discovery response, for two of the operational goals, equally weighted values for all three Exelon Operating Companies, including Philadelphia Electric (“PECO”), Baltimore Gas & Electric (“BGE”), and ComEd, enter into the calculation for purposes of LTPSAP achievement. AG Ex. 1.8 at 2. Thus, the relative weight afforded operational performance at ComEd is only one-third the weight used in the Company’s modified disallowance. AG Ex. 1.0C2 at 26:601-605. Additionally, the LTPSAP payouts remain subject to an overall Total Shareholder Return (“TSR”) modifier that can increase or decrease overall LTPSAP plan awards by up to 25%, which is a larger overall weighting than has been afforded the CAIDI and SAIFI reliability factors relied upon for ComEd’s proposed 13.5 percent recovery rate. AG Ex. 1.0C2 at 26:606-609; AG Ex. 1.8 at 3-6; ComEd Ex. 2.01 at 12-13. Finally, according to AG Exhibit 1.9, the weighted average results achieved in 2013 under Exelon’s LTPSAP totaled 147.8 percent, but “[t]he Compensation Committee of the Exelon Board of Directors reviewed the results of the LTPSA plan and limited the total payout percentage to 125%.”

The AG cited Mr. Brosch’s direct testimony that this type of subjective, high-level modification of LTPSAP calculated results is not supportive of ComEd’s assertion that 13.5 percent of payouts under the plan are now directly tied to ComEd operational performance. AG Ex. 1.0C2 at 27:619-621. ComEd witness Brinkman stated in her direct testimony that ComEd’s LTPSAP plan was changed in 2013 “to directly assign payout percentages to individual goals allowing for greater transparency regarding what portion of an award is related to ComEd’s operational performance and what portion(s) related to EPS metrics and the operations of other Exelon subsidiaries.” ComEd Ex. 2.0 at 27:552-555. While it is true that individual performance goals have now been given a quantified weighting (*see* ComEd Ex. 2.01 at 17), it is still true that awards are based on the performance of multiple Exelon subsidiaries and affiliates, including PECO, BGE, and Exelon Nuclear. Moreover, the majority of plan metrics are driven by financial performance, with 30% of the LTPSAP award based on the return on equity of Exelon Corp. and another 30% based on funds from operations (“FFO”) as a ratio of outstanding debt. The Total Shareholder Return feature remains, as does the Compensation Committee’s power to make *ad hoc* reductions to LTPSAP expense.

Because ComEd is now, as of its rebuttal testimony, seeking recovery of only 5.7% of 2013 recorded LTPSAP expenses (ComEd Ex. 12.0 at 11:217-244), the People recommend disallowance of the 5.7% that ComEd seeks to include in revenue requirement, for the reasons stated above.

VII. RECONCILIATION

a. Overview

b. Potentially Contested Issues

²⁵ Order, Docket No. 13-0318, December 18, 2013, at 44-45, available at <http://www.icc.illinois.gov/downloads/public/edocket/365294.pdf>.

1. Calculation of Interest on Reconciliation Balance

i. AG Position

The statute creating the new formula rate process is clear that the formula must “[p]rovide for the recovery of the utility’s *actual costs* of delivery services that are prudently incurred and reasonable in amount consistent with Commission practice and law.” 220 ILCS 5/16-108.5(c)(1) (emphasis added). The statute further requires the formula to provide for an annual reconciliation of the revenue requirement established for a calendar year and the subsequently determined “actual” revenue requirement for that year. 220 ILCS 5/16-108.5(c)(6) and (d)(1). The statute provides that the reconciliation shall be recovered or refunded “with interest calculated at a rate equal to the utility’s weighted average cost of capital approved by the Commission for the prior rate year.” *Id.*

Consistent with the overall purpose of the statute to enable the utility to recover its actual costs, the interest charge is intended to compensate the utility for the time value of money for the period of time it must finance the reconciliation balance. The General Assembly directed that the interest rate equal the “utility’s weighted average cost of capital approved by the Commission for the prior rate year,” but did not specify how to determine the amount to which the interest should be applied. The AG maintains that, consistent with the statute’s overall purpose to match revenues with costs, the Commission should only apply the interest rate to amounts that the utility will actually have to finance during the reconciliation period. Stated differently, interest should be applied to only the net cash flow that was foregone by the utility while awaiting recovery of the reconciled revenue requirement.

In responding to the Commission’s stated interest in its last formula rate order in additional information about the People’s recommendation to apply interest to the net-of-tax reconciliation balance, AG witness Effron explained how the reconciliation balance is calculated. He pointed out that “[t]he actual reconciliation revenue requirement appears on Schedule FR A-1-REC. As can be seen on Lines 16-20, there is a ‘gross-up’ of the return component to provide for income taxes.” AG Ex. 2.0 at 7:145-147. Moreover, “The reconciliation revenue requirement implicitly includes any income taxes due on the difference between the actual revenue requirement and the revenue requirement in effect.” *Id.* at 7:151-153.

Mr. Effron demonstrated that the reconciliation balance presented by ComEd actually is made up of several components, including revenues representing a return for shareholders (the return on equity) and revenues that will be used to pay taxes in the year the revenues are received. *Id.* at 8:169-171. While shareholders have a claim to the revenues representing the additional income that is due them, entitling them to interest on that amount during the reconciliation period, they have no claim on the revenues recovered to pay taxes. *Id.* at 8:172-174. As Mr. Effron pointed out:

It would be inequitable and unreasonable to allow ComEd to recover interest costs from customers on a balance due to the government, which is what the deferred taxes on the reconciliation balance represent.

To allow the Company to recover interest on a balance due a third party violates the most basic principles of utility ratemaking. Yet this is what happens if the reconciliation balance on which interest is accrued is not reduced for applicable income taxes. To avoid this inequitable and unreasonable result, the balance on which interest is accrued should be reduced by applicable deferred income taxes.

Id. at 8:174-182. (emphasis added). Significantly, the income tax is not due or paid until after the reconciliation revenue is actually received, eliminating any actual financing costs to ComEd. *Id.* at 9:186-187; AG Ex. 1.0C2 at 5 (“When the cash recovery of reconciliation revenues is delayed, the cash payment of related income taxes is also delayed.”).

Mr. Effron presented AG Exhibit 2.1 showing the calculation of taxes on the reconciliation balance. While the reconciliation amount, or the actual revenue requirement Additional Net Income Required to Earn the Authorized ROE was \$133,293,000, consumers will pay an additional \$93,300,000 for the taxes ComEd will pay when this revenue is received, resulting in a total reconciliation charge of \$226,593,000. AG Ex. 2.0 at 9:191-200; AG Ex. 2.1. There is no dispute that consumers will provide ComEd with the revenues necessary to cover the \$93,300,000 in taxes. However, consumers should not pay interest on that tax amount now because (1) it is not payable in cash until after the revenues are received, as Ms. Brinkman revealed in her rebuttal testimony, ComEd Ex. 12.0 (Rev.) at 29:606-608, and (2) therefore ComEd does not need to finance that amount pending recovery of the reconciliation revenues.

The interest associated with the reconciliation balance excluding the \$93,300,000 in taxes due the government after reconciliation revenues are received equals \$20,099,000, which is \$14,068,000 less than the \$34,167,000 calculated by the Company. AG Ex. 2.0 at 9:197-199. This results in a total “Reconciliation with Interest” that should appear on ComEd Ex. 3.01, Sch. A-4, line 31 of \$246,692,000. *Id.* at 9:200; AG Ex. 2.1.

AG witness Mr. Brosch explains the issue somewhat differently, but arrives at the same conclusion as Mr. Effron. According to Mr. Brosch:

It is useful to consider the net cash flow benefit ComEd was denied when its cash revenues charged to ratepayers in 2013 were not sufficient to fully fund the Company’s delivery service revenue requirement in that year. This is important because reconciliation interest should be charged to ratepayers only as needed to compensate ComEd for the incremental financial investment that was required by the Company’s net cash revenue shortfall. If we assume cash revenues were under- recovered by \$230 million in 2013, which is the amount estimated by ComEd that was recorded as both a regulatory asset and an increase to book revenues in its FERC Form 1, the avoided cash payment of income taxes on this accrued book adjustment to revenues was approximately \$95 million. This means that ComEd’s actual foregone net cash flow in 2013 was not the full \$230 million of revenues recorded within

the regulatory asset, but instead was this amount of foregone revenue reduced by the foregone incremental cash income taxes that were not payable in 2013. Using these values, ComEd was denied net cash flow of \$135 million in 2013 when both the accrued book non-cash revenues and the avoided cash income tax payments on those revenues are considered.

AG Ex. 1.0C2 at 14:323-15:338. Mr. Brosch presented in his rebuttal testimony an example where another state's public utilities commission, in this case Hawaii, recently found that income tax deferrals should be recognized as an offset to the balance of accrued revenues that is allowed to earn interest within the Revenue Balancing Accounts of the Hawaiian Electric Companies ("HECO Companies"). A short-term-debt cost interest rate was ordered for application to deferred revenue balances, and the HECO Companies were then ordered to seek and obtain IRS approval for an income tax accounting method change to secure the same income tax deferral benefits that are enjoyed by ComEd and Ameren Illinois Company in Illinois. After obtaining IRS approval for such accounting, the HECO Companies have modified their interest calculations applicable to their deferred revenue regulatory asset balance, so as to employ a net-of-income-tax approach. AG Ex. 3.0C at 17:378-389. Relevant documents from that proceeding in the Hawaii Public Utilities Commission were entered into evidence as AG Exhibit 3.2.

EIMA is intended to provide the utility with the recovery of its actual costs. It would be unreasonable and inconsistent with ComEd's actual tax liability to compensate it with interest as if it paid taxes before the reconciliation revenues are received. However, that is the effect of ComEd's application of interest to the reconciliation under-collection, increased for taxes. AG Ex. 2.0 at 7. The People request that the Commission adjust the reconciliation balance to reflect the net-of-tax under-collection, and restate the interest applicable to the reconciliation under-collection to \$20,099,000, representing an adjustment of \$14,068,000 to the Company's requested interest amount.

2. ALTERNATIVE ARGUMENT ONLY: In The Absence Of A Direct Reconciliation Interest Calculation Adjustment, The Commission Should Include The ADIT Recorded On ComEd's Books As A Delivery Related Item

The AG presented the testimony of both David Effron and Michael Brosch that the most accurate way to account for the interest on ComEd's reconciliation balance is to recognize that ComEd will not have an income tax expense related to the reconciliation revenues until it receives those revenues. However, in ComEd's 2013 formula rate docket, the Commission declined to adopt their recommendation because it was concerned that the statute did not expressly authorize the net-of-tax adjustment. Docket 13-0318, Order at 63 (Dec. 18, 2014). In a related docket to amend the formula to reflect the net-of-tax treatment the Commission declined to adopt the People's recommended net-of-tax reconciliation, the Commission stated:

While there may be merit to the AG and CCI's proposal and while there may be some debate as to the plain meaning of the Act, the Commission is troubled by the fact that although Section 16-108.5(d)(1) fails to prohibit such accounting treatment, the

converse is also true—it does not appear to require or even reference it. Further, as ComEd points out, where the Act does intend that adjustments be made to an amount of a balance, it has done so specifically, as in the case of projected plant additions which are to be included on a net basis considering updated depreciation reserve and expense, 220 ILCS 5/16-108.5(c)(6), or in the ROE collar calculation where the utility is required to apply a credit or charge that “reflects an amount equal to the value of that portion of the earned rate of return on common equity that is more than 50 basis points higher [or lower] than the rate of return on common equity calculated pursuant to paragraph (3) of this subsection (c)...for the prior rate year, adjusted for taxes.” 220 ILCS 5/16-108.5(c)(5).

The Commission would note that this is not the first time the clarity of this subsection concerning the reconciliation balance has been called into question and that the legislature has already once amended it. Thus, it is difficult for the Commission to support an interpretation of the Act which reads into it exceptions, limitations, or conditions the legislature did not express. *Davis v. Toshiba Machine Co.*, 186 Ill.2d 181, 184-185 (1999). Considering all the arguments presented regarding the meaning of Section 16-108.5(d)(1), the Commission cannot at this time support the AG and CCI’s interpretation. For purposes of this proceeding, ComEd is entitled to the full reconciliation balance with interest calculated at a rate equal to the utility’s weighted average cost of capital approved by the Commission for the prior year. 220 ILCS 5/16-108.5(d)(1). In the future, if further arguments from the parties are presented or clarity from the legislature is provided on this topic, the Commission will revisit the issue.

Docket No. 13-0553, Final Order at 43 (Nov. 26, 2013). While the AG has presented the interpretation of EIMA and specifically the Commission’s decision not to make the accounting adjustment necessary to apply the interest to the actual amount subject to financing, to the Appellate Court, no decision has been issued to date. See Case No. 14-0275, Appellate Court of Illinois, First Judicial District.

The AG argued that should the Commission decline to adopt the interest offset approach presented by Mr. Effron in this docket, and also not remove the ADIT associated with the reconciliation revenues as recommended in the alternative by AG witness Michael Brosch, consumers will be required to provide ComEd a return on non-investor funds as well as paying interest on income taxes that have not been paid. A deduction to the delivery services rate base to remove the Accumulated Deferred Income Taxes, or ADIT, associated with the reconciliation balance is necessary to protect consumers from paying a rate base return on the non-investor-

supplied ADIT funds arising from ComEd's delayed receipt of reconciliation revenues. AG Ex. 1.0C2 at 7:157-161.

Mr. Brosch explained that "[u]tilities are capital-intensive businesses that invest continuously in newly constructed or acquired assets. These large annual capital investments generate persistently large income tax deductions for bonus/accelerated depreciation and other tax deductions and credits that must be recognized by recording ADIT under Generally Accepted Accounting Practices ("GAAP") rules. ... [ADIT] represents a significant source of capital to the utility." *Id.* at 7:163-175.

The AG emphasized that ADIT balances represent a form of zero-cost capital to the utility created by the income tax savings permitted under tax law. The Commission routinely recognizes ADIT balances as rate base reductions in electric delivery service and other rate proceedings so that consumers do not provide the utility with a return on this non-investor resource. The Appellate Court in *Ameren Ill. Co. v. Ill. Comm'rce Comm'n*, 2013 IL App (4th) 121008, ¶ 34 explained ADIT as follows:

ADIT quantifies the income taxes that are deferred when the tax law provides for deductions with respect to an item in a year other than the year that the item is treated as an expense for financial reporting purposes." (Internal quotation marks omitted.) *Ameren Illinois Co. v. Illinois Commerce Comm'n*, 2012 IL App (4th) 100962, ¶ 11, 967 N.E.2d 298. For regulated utilities, ADIT reduces the utility's rate base because it is treated as no-cost capital. *Ameren Illinois Co.*, 2012 IL App (4th) 100962, ¶ 11, 967 N.E.2d 298. In other words, ADIT represents taxes payable in the future that provide a source of funds the utility can use until such time the taxes become due.

In that decision the Court affirmed the Commission's deduction of ADIT from Ameren's rate base in its annual formula rate review. *Id.* at ¶ 40.

ComEd has recognized jurisdictional ADIT generally in this case. See ComEd Ex. 13.01, Sch. B-1, Line 17 & App. 4. However, ComEd only deducts "jurisdictional" ADIT, or deferred taxes related to Illinois delivery operations. As pointed out by AG witness Brosch, "ComEd has cumulatively recorded \$164.9 million of ADIT, representing the deferred income taxes associated with the Company's cumulative reconciliation balance as of December 31, 2013." AG Ex. 1.0C2 at 8. However, ComEd treats this ADIT balance as if it were non-jurisdictional.

ComEd suggests that this ADIT can be ignored notwithstanding its association with the EIMA reconciliation process that plainly stem from Illinois jurisdictional delivery services. ComEd argues that the reconciliation balance is not included in rate base so the associated ADIT should not be treated as jurisdictional. See, e.g., ComEd Ex. 25.0 at 26:513-522. The AG pointed out, however, that allowing WACC-based interest on the full reconciliation balance is comparable to including the reconciliation balance in rate base (including the tax portion), by making ratepayers responsible for a return on this investment.

The People maintain that the Commission should resist ComEd's request to put form over substance. EIMA specifically defined the way the reconciliation balance is treated. The law requires that the reconciliation under-collection be recovered in a single rate year, beginning one year after the close of the reconciliation year (costs as of December 31, 2013 recovered beginning January 1, 2015). *See* 220 ILCS 5/16-108.5(d). Rather than being recovered as a regulatory asset that is included in rate base and receives a rate base return, the statute specifies that the reconciliation under- (or over-) authorization be subject to an interest rate equal to the weighted average cost of capital. *Id.* at 5/16-108.5(d)(1). By specifying that the reconciliation under-authorization is subject to interest, rather than a rate base return, the statute creates the premises that must be accommodated while at the same time applying the established regulatory and legal standards as required by Section 16-108.5(c) and (d)(3) ("The Commission shall apply the same evidentiary standards, including, but not limited to, those concerning prudence and reasonableness of costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of the Act").

It is well-established that ADIT represents non-investor capital. *E.g., Ameren, supra*; AG Ex. 2.0 at 7-8. It is also without question that ComEd has recorded \$164.9 million in deferred taxes arising from the Company's right to receive the reconciliation revenues in the future. AG Ex. 1.0C2 at 8:191-194. The question then becomes whether the Commission has the power to protect consumers given the fact that ComEd has \$164.9 million in deferred tax benefits associated solely with the reconciliation recovery. As Mr. Brosch explained, "...distribution service ratepayers will provide a full return on this regulatory asset in the form of interest at the WACC. There is no basis to treat reconciliation-related ADIT balances as if they are non-jurisdictional in setting formula delivery service rates. Yet this non-jurisdictional treatment is precisely how ComEd has accounted for its recorded reconciliation-related ADIT balances." AG Ex. 1.0C2 at 8:199-9:203.

The Appellate Court has affirmed the Commission's power under EIMA to deduct ADIT from rate base even when that authorization is not expressly stated. *Ameren*, 2013 IL App (4th) 120081 at ¶ 37 ("Ameren argues the Modernization Act did not provide the Commission with the authority to deduct ADIT because, while the statute provides guidance for other adjustments, the statute fails to mention an adjustment for ADIT"). The Court, recognizing the function of ADIT and its provision of non-investor capital, stated: "As it was consistent with the common practice of the Commission to include ADIT in the ratemaking process, we conclude the Commission did not err by including the ADIT adjustment for projected plan additions in its ratemaking calculation." *Id.* at ¶ 40.

Both AG witnesses Effron and Brosch have recommended that the Commission account for the fact that ComEd will not pay income taxes on the reconciliation balance until the reconciliation revenues are actually received by the company. Therefore, consumers should not be required to pay interest on that tax liability as part of the reconciliation recovery. If the Commission declines to make the adjustment recommended by Mr. Effron and discussed in subsection 1 above within the interest calculation, the People request that, in the alternative, the Commission recognize ComEd's recorded ADIT balance as a deduction to rate base. Adoption of one of these options is essential so that consumers do not pay (1) interest on the deferred reconciliation-related income taxes before they are due while (2) the ADIT amount recorded on

ComEd's books is ignored and benefits only the Company's shareholders. The revenue requirement effect of this alternative adjustment is shown at AG Exhibit 3.1, page 1.

VIII. REVENUES

a. Overview

b. Potentially Contested Issues

1. Billing Determinants

i. AG Position

Billing determinants are used to establish the rates that produce the revenue requirement authorized by the Commission. AG Ex. 2.0 at 5; ComEd Ex. 2.0 at 46. ComEd made the billing determinants adjustment affirmed by the Appellate Court in its reviews of ComEd's 2011 and 2012 formula rate dockets. The Appellate Court in its review of Docket No. 11-0721 described the billing determinant issue as a "population adjustment" based on the fact that ComEd had "proposed the building of new facilities to accommodate growth in the number of customers it serves." 2014 IL App (1st) 122860 at ¶ 19. The Court related the People's position that "without any adjustment for the expected increase in the number of customers... ComEd will systematically collect sums in excess of its revenue requirement." *Id.* The Court concluded that ComEd had not shown that the law precluded this adjustment, that the Commission had acted "contrary to the manifest weight of the evidence," or that the Commission acted "unreasonably." *Id.* at ¶¶ 57-58. In its review of the Commission's decision in Docket 12-0321, the Court again affirmed the Commission and further found ComEd collaterally estopped from further challenging the Commission's authority to make this adjustment. 2014 IL App (1st) 130302 at ¶¶ 50-62.

However, ComEd argued that this adjustment should not be made notwithstanding the prior, binding, Commission and Court decisions.

Consistent with the prior formula rate cases and Appellate Court decisions, in this docket AG witness Effron supported the now well-established adjustment to the billing determinants for 2015 to include the effect of the growth in customers associated with ComEd's 2014 plant additions included in rate base. AG Ex. 2.0 at 5-6. The AG pointed out that no adjustment needs to be made to implement Mr. Effron's billing determinants recommendation, which is consistent with the recent Appellate Court rulings on the issue. The AG thus recommends that the Commission should adopt the rate design ComEd has proposed that includes service to customers associated with the projected plant additions included in rate base under the formula. See 220 ILCS 5/16-108.5(c)(5).

XI. CONCLUSION

For the foregoing reasons, the People of the State of Illinois request that the Commission issue an order consistent with the positions stated in this Statement of Position.

The People of the State of Illinois

By LISA MADIGAN, Attorney General

By:_____/s/_____

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September 22, 2014